Supreme Court, U.S.
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No. 99-1

IN THE

Supreme Court of the United States

HOLLY WHITE,

Petitioner,

v.

DAVID FIST, PERSONAL REPRESENTATIVE OF THE ESTATE OF GERTRUDE GELLER, TEMPLE ISRAEL FOUNDATION, MARSHALL GELLER, MICHAEL A. CHOZEN, JAY MYERS CHOZEN, and LORI ANNE CHOZEN,

Respondents.

On Petition For Writ of Certiorari to the Oklahoma Court of Appeals

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REPLY BRIEF FOR PETITIONER

Of Counsel:
Paul M. Smith
Jenner & Block
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Anthony P. Sutton*
Herrold, Herrold, Sutton & Davis, P.A.
2250 East 73rd Street
Tulsa, OK 74136-6835
(918) 491-9559

Counsel for Petitioner

*Counsel for Record

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REPLY BRIEF FOR PETITIONER

Respondents, in their brief in opposition, have offered no persuasive argument for denying a writ of certiorari. The Court's ruling in *Lalli v. Lalli*, 439 U.S. 259 (1978) -- holding that it is constitutional to bar an illegitimate from seeking inheritance by intestate succession if she did not establish paternity before the father's death -- plainly needs reexamination, and this case is a good vehicle for doing so.

I. RESPONDENTS OFFER NO PERSUASIVE ARGUMENT SUPPORTING THE CONTINUED VALIDITY OF *LALLI*.

A. Respondents Have Failed to Articulate Any State Interest Justifying the Onerous Rule Applied Here to Penalize Petitioner.

The weakness of respondents' arguments against review becomes most telling when they try to identify a state interest that justifies a flat ban on assertion of paternity claims in estate proceedings where, as here, paternity was not established prior to the putative father's death. Respondents recognize a need to articulate some interest unrelated to the "problems of proof" of paternity after death -- problems that were the key to this Court's reasoning in *Lalli* but have now faded to insignificance in light of the availability of DNA testing. But their efforts to describe some additional state interest are unavailing.

It does no good, first of all, merely to repeat the phrase "orderly disposition of assets" as if it were self-evident that allowing claims like petitioner's would cause substantial disorder in estate proceedings. Precisely because problems of proof have been dramatically ameliorated, there is no reason to assume that undue disruption will ensue merely because one of the claimants in a proceeding is an illegitimate bearing the burden of proving paternity.

Nor is it enough to assert that Jews and others may dislike the exhumations that are often required to allow DNA testing. Even if *Lalli* were overruled, the state courts would retain the right to decide in a given case whether an exhumation is justified. In some cases, they would have the option of relying on DNA testing of living relatives. *See* Pet. 15. In others, they might choose to require a sufficient showing of

extrinsic evidence of paternity before ordering exhumation. But the fact that such judgments must be made does not justify a flat rule against posthumous claims, applicable even in a case like this one where the rule operates to deny a person a fair opportunity to assert and protect her rights.

Respondents are equally unpersuasive in defending *Lalli* as vindicating a state interest in "allowing their residents to decide for themselves the distribution of their property." Br. in Opp. at 18. The issue here is whether states can arbitrarily cut off illegitimates' (but not legitimates') right to inherit by intestate secession, where residents have *not* made those decisions. Under Oklahoma law, testators, such as Mrs. Geller, have the right to dispose of their property as they so desire and they may effectively disinherit those whom they desire. Fathers and grandmothers who have unknown (or known) children are able to express their intent regarding inheritance by any potential illegitimate child in a will, which would preclude an inheritance claim. In the present case, however, neither Mrs. Geller nor the putative father executed any instrument evidencing the requisite intent to disinherit petitioner, even though they both knew petitioner existed and knew of her potential heirship claim. *See* p. 7 *infra*. None of the constitutional arguments advanced by petitioner herein alters or affects an individual's right to decide for himself the distribution of his property.

When all is said and done, *Lalli* did rest on the proposition that paternity was hard to prove after the death of a putative father, and that such efforts would accordingly disrupt estate proceedings. Those intuitions simply are no longer valid, and the constitutional calculus needs to be changed.

B. The *Lalli* Rule is in Tension With the *Mill-Pickett-Clark* Trilogy.

Respondents are no more persuasive when attempting to minimize the significance of legal developments since *Lalli*. They claim that there is no relation between the constitutional issue presented here and the constitutional issue presented in *Mills v. Habluetzel*, 456 U.S. 91 (1982), *Pickett v. Brown*, 462 U.S. 1 (1983), and *Clark v. Jeter*, 486 U.S. 456 (1988). But the latter line of cases cannot be ignored so easily. The Court there held that the states' interest in avoiding stale paternity claims was outweighed by the interest of illegitimate children in proving paternity and obtaining support. It invalidated even a six-year statute of limitation as erecting an undue barrier. Here, the question is whether any state interest that remains applicable in light of current technology justifies a state in erecting an insurmountable barrier to pursuit of inheritance claims whenever a putative father dies before the child has had the opportunity to prove a paternity claim. That question cannot be answered without reference to the *Mills-Pickett-Clark* trilogy.

Respondents themselves characterize the trilogy as cases applying the "unexceptional principle . . . that where a state decides to create a judicially enforceable right of a child to receive benefits from a father, there is no plausible state interest in excluding illegitimate children from the receipt of such benefits." Br. in Opp. at 12. What they do not explain is why the same principle should not be applied here as well. In the present case, petitioner seeks to enforce an undisputed right to inheritance by and through her putative father. What the State has done, however, is to make that right effectively meaningless for one class of illegitimates. That requires a very compelling justification.

Certainly it cannot be suggested that the statutory benefits of child support addressed in the *Mills-Pickett-Clark* trilogy are inherently more fundamental than inheritance rights. Both are obviously very important in particular cases. Indeed, for a child like petitioner whose father died soon after her birth, inheritance rights may be all-important.

Finally, respondents repeatedly quote one sentence from *Reed v. Campbell*, 476 U.S. 852 (1986), suggesting that the Court there implicitly reaffirmed *Lalli*. Br. in Opp. at 7, 13. But the only issue in *Reed* was whether a state could constitutionally refuse to enforce retroactively the right of an illegitimate to claim intestate inheritance, established in *Trimble v. Gordon*, 430 U.S. 762 (1977). The Court ruled *against* the state, emphasizing that any differential treatment of illegitimates in laws governing inheritance must "have an evident and substantial relation to the State's interest in providing for the orderly and just distribution of a decedent's property at death." 476 U.S. at 855. For the reasons we have stated, a rule flatly barring all posthumous paternity claims, although perhaps once justified as serving that state interest, no longer can be so justified.

C. Respondents Do Not and Cannot Make the Advances in DNA Testing Disappear.

Respondents' attacks on the reliability of DNA testing itself, Br. in Opp. at 19-21, are utterly unpersuasive. Such testing is routinely used in judicial matters and has vastly increased the accuracy of efforts to determine paternity. Indeed, respondents do not claim otherwise.

Nor does it make sense to suggest that claims based on DNA testing have no "logical stopping point." Br. in Opp. at 21-22. The stopping point depends on state law. If a legitimate

could inherit in a given situation, an illegitimate able to prove paternity should not arbitrarily be denied the same right. Thus, here, under Okla. Stat. tit. 84, § 132, a pretermitted heir who is "the issue of any deceased child," i.e., a grandchild, is entitled to share in a testator's estate. Similarly, under Okla. Stat. tit. 84, § 215, a grandchild is allowed to inherit from the father "and his kindred." The "logical stopping point" is at the grandchild level.

Oklahoma law also establishes one further "stopping point": assuming adequate notice has been given to potential claimants, a final decree and distribution in a given probate estate operates as a bar to any claims against that estate. *See* Okla. Stat. tit. 58, § 632. Here, however, the probate proceeding had just commenced when the petitioner asserted her claims. There was no final decree and distribution order that could have effectively barred petitioner's pretermitted heirship claims. She simply was not allowed to pursue her claims, because she had never had an opportunity to establish paternity during her father's lifetime.

In sum, respondents have offered no substantial response to petitioner's constitutional arguments, and no reason why *Lalli* should be left on the books. This Court frequently cautions lower courts against anticipating the demise of the Court's prior rulings. In so doing, the Court takes on the responsibility to scrutinize cases that appear to have become outmoded in the extreme. This is just such a situation.

II. RESPONDENTS' ARGUMENTS BASED ON DEFENSES NOT ADJUDICATED BELOW ARE BOTH IRRELEVANT AND WRONG.

Respondents fall back on the shopworn tactic of presenting this Court with state-law arguments they would

assert on remand in the event the Court were to rule for petitioner. But such arguments, of course, provide no basis for denying review. The question presented here is an important one, regardless of whatever additional defenses respondents think they have available to them.

In any event, respondents are wrong. First, they argue that petitioner's claim is time-barred under the 19-year statute of limitations for paternity claims. But that statute applies only to actions to establish paternity -- not to claims seeking part of an estate. Moreover, if the statute did operate to cut off petitioner's claims here, it would be just as unconstitutional as the inheritance statute challenged here. When an illegitimate child's father dies during her infancy, she has no opportunity to file a paternity action. If the next opportunity to assert paternity is in an estate proceeding 30 years later, treating that claim as time-barred is functionally the same, and just as unfair, as cutting it off the day the father died. In any event, respondents never raised this purported statute of limitations defense in the courts below.

Similarly, the claim that Mrs. Geller barred this claim in her will is spurious. The provision of Mrs. Geller's will upon which respondents rely is commonly referred to as a "simple, general" no contest clause because it does not specifically identify an individual or any particular class of individuals sought to be disinherited. Under Oklahoma law, such a clause is not sufficient to bar a claim by a potential heir. In *In re the Estate of Woodward*, 807 P.2d 262 (Okla. 1991), the Oklahoma Supreme Court held that a will must contain "strong and convincing" language indicating an express intent to disinherit. *Id.* at 264. The Court reaffirmed the principle that a testator's intent to omit must be shown by at least

identifying the disinherited person by name or class.[1] *Woodward* was decided and published three months *before* Mrs. Geller's will was executed. She and her counsel were therefore on notice not only of petitioner's potential claim but also of the rule that a general disinheritance clause is not legally sufficient.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
Paul M. Smith
Jenner & Block
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Anthony P. Sutton*
Herrold, Herrold, Sutton & Davis, P.A.
2250 East 73rd Street
Tulsa, OK 74136-6835
(918) 491-9559

Counsel for Petitioner

*Counsel for Record

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[1]Respondents rely on dictum in a California case -- *Estate of Gardner*, 580 P.2d 684 (Cal. 1978) -- suggesting that it may be enough for a will to state that there shall be no inheritance by "those who would take if I died intestate." *Id.* at 685 (internal quotation marks omitted). But whatever the law may be in California, *Woodward* makes clear that in Oklahoma it is not enough for a will to bar inheritance by "all other persons." Mrs. Geller's will used language that is functionally equivalent -- granting one dollar to "anyone" who would otherwise have a right to make a claim.